No. 12,688

IN THE

United States Court of Appeals

For the Ninth Circuit

J. HOWARD MCGRATH, Attorney General of the United States, and D. W. BREWSTER, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii,

Appellants,

vs.

CHUNG YOUNG,

Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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JURISDICTION.

Title 8 U.S.C. (Nationality Act of 1940) Section 903 confers on the District Court jurisdiction in this matter, and Title 28 U.S.C. Section 225 grants appellate jurisdiction to this court.

STATEMENT OF FACTS.

This proceeding was brought in the United States District Court for the Territory of Hawaii by Chung Young under the provisions of the Nationality Act of 1940 (8 U.S.C. 903) for a judgment declaring him to be a citizen of the United States. He alleged the Immigration Service had refused to issue him a "Certificate of Citizenship—Hawaiian Islands", which he needed in connection with his projected trip abroad (R. p. 3). These certificates are issued to citizens residing in the Territory[1] as evidence of citizenship, on a showing they intend to depart temporarily from the United States.

Appellee was admitted by a Board of Special Inquiry of the Immigration Service in 1923 as a Hawaiian-born citizen after a hearing in which Appellee and three witnesses testified (R. p. 17; Appellee's Exhibit "A"). He has resided in the Territory since his admission (R. p. 17).

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[1] "Citizens of the United States residing in Hawaii; issuance of certificates. A resident of Hawaii who intends to depart temporarily from that Territory shall be granted a 'Certificate of Citizenship—Hawaiian Islands' by the officer in charge at Honolulu, Hawaii, upon proving to the satisfaction of that official that he is a citizen of the United States, a bona fide resident of the Territory of Hawaii and that he actually intends to depart temporarily. Such certificates may be retained by the person to whom issued. If the officer in charge at Honolulu is not satisfied that the applicant is entitled to this certificate, the application shall be denied and the applicant notified that he may appeal to the Attorney General from the adverse decision. Ten days will be allowed within which to file notice of appeal with such immigration officer. All evidence which was submitted in support of the application shall constitute the record and shall be forwarded to the Central Office in cases where appeals are taken."

Code of Federal Regulations 128.5.

On the trial Appellee testified to his Hawaiian birth and caused the record of his 1923 hearing before a Board of Special Inquiry to be put in evidence.[2] The Appellants offered no evidence that Appellee was not born in the Territory and did not deny they had refused to give him the certificate applied for. The trial judge found from the evidence adduced that Appellee was born in Honolulu April 26, 1901, was a citizen of the United States and was entitled to a judgment to that effect (R. p. 9), and in due course such a judgment was entered (R. p. 10).

SUMMARY OF ARGUMENT.

1. Counsel for Appellants on the trial called an Immigration Inspector and asked him (a) if the witnesses who testified for Appellee before a Board of Special Inquiry in 1923 had also testified for other applicants for admission, and (b) if the Board of Health record covering death of Lai Yung, the father of Appellee, had been claimed by others seeking admission as applying to their father. To each of these questions counsel for Appellee objected as being immaterial, and the objections were sustained (R. pp. 25 and 26). Counsel excepted to the ruling of the court with respect to each question, *but made no offer of proof*. Appellee's position is that in the absence of an offer of proof, Appellants cannot complain of the court's ruling.

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[2]Exhibit 1 and Exhibit "A" are on file in this court but not included in printed record.

2. Appellee was found to be an Hawaiian-born citizen by a Board of Special Inquiry which admitted him in 1923, and this action gave him prima facie status as a citizen. The refusal of the Immigration Service to issue him a "Certificate of Citizenship—Hawaiian Islands" on a showing he wished to travel abroad, authorized the District Court, under Title 8 U.S.C. 903, to enter a judgment that Appellee was a citizen of the United States, Appellants having offered no evidence to overcome Appellee's prima facie case made out by his own testimony and record of his 1923 hearing before the Board of Special Inquiry.

ARGUMENT.

Appellants present in this appeal that the trial court erred in sustaining objections to the following questions asked of Robert E. Lee, an Immigration Inspector, called as a witness for Appellants (R. p. 22):

> 1. "Q. Did you review the files of the Immigration Service to find out whether these witnesses had appeared in behalf of other applicants for admission to the United States?"

The objection to this question on the ground that it was incompetent, irrelevant and immaterial was sustained by the trial judge (R. p. 25).

> 2. "Q. (By Mr. Hoddick): Mr. Lee, showing you Certificate of Death No. A-502, dated December 6, 1948, covering the death of one Lai

> Yung, which was previously shown to the plaintiff, I ask you if you have examined the records of the Immigration and Naturalization Service for the purpose of determining whether other applicants for admission to the United States have claimed that same death record."

This question was objected to on the same ground and was sustained (Tr. p. 26).

The court's rulings with respect to both questions were unquestionably correct. If counsel was dissatisfied with the rulings, it was his duty to make offers of proof and his failure to make any such offers leaves nothing for review. As said in *Patton v. Lewis,* 146 Fed. (2d) 544: "Where an objection to a question is sustained, an offer must be made disclosing the substance of proffered evidence, otherwise the ruling of the court is not reviewable."

> "To secure a review of ruling excluding evidence, an offer of proof is essential so that the court may know the relevancy and materiality of such testimony."
>
> *McVeigh v. McGurren,* 117 Fed. (2d) 672. Certiorari denied 61 Sup. Ct. 960, 313 U.S. 575.

In *New York Life v. Doerkson,* 75 Fed. (2d) 96 p. 101, the court said:

> "Where an objection to an evidence is sustained in an action at law, the general rule is that the record must disclose the substance of proffered evidence before there can be a reversal because of the rejection."

See also:

Albrecht v. New Amsterdam Casualty Co., 163 Fed. (2d) p. 16;

Federal Surety Co. v. Standard Oil Co., 32 Fed. (2d) 119;

Hatch v. U.S., 34 Fed. (2d) 436;

Sacramento Suburban Fruit Lands Co. v. Miller, 36 Fed. (2d) 922.

On the basis of the foregoing authorities, we submit the trial court's ruling on the two questions is not open to review.

If counsel wished to show that the witnesses who appeared for Appellee in 1923 had on different occasions testified in other cases in such a way as to bring criticism on them, obviously it could not have the legal effect of impeaching their 1923 testimony and it would have nothing to do with the weight of their testimony, as their evidence was positive and uncontradicted and left nothing to weigh it against (*Wong Kam Chong v. U.S.,* 111 Fed. (2d) 707 at 711).

It is surprising to note in Appellants' brief the statement that the court's ruling sustaining objection to the question deprived them of an opportunity to prove that Appellee's witnesses were "professional". This statement is without truth, is baseless and should not have been made. The objection was well taken, the evidence inadmissible, and regardless of counsel's personal opinion of the witnesses, who are not alive to defend themselves, the judge's ruling was manifestly correct. Also, if counsel wished to show that the 1902

death record of Yung Lai had been used by others in representing he was their father, evidence would have to be adduced that Appellee was not the child of Yung Lai and that his claim in that regard was spurious. Appellants made no pretense of offering any such proof. There is not a scintilla of evidence against the honesty and truthfulness of Young How Yee, Down Tong Chin and Hu Tiam, Appellee's 1923 witnesses, in their testimony in his case, or any evidence or suggestion of evidence that the 1902 death record of Yung Lai did not appertain to the father of Appellee.

It is contrary to the fundamental principles of due process that Appellee should be required to assume the obligation of vicarious responsibility for the acts of individuals in matters in which he has no knowledge, connection or interest, simply because twenty-seven years ago three of them appeared as witnesses and testified to his Hawaiian birth, or because certain unnamed Chinese in good faith or otherwise represented that the Yung Lai who died in 1902 was their father.

It is inconceivable that the ruling of the judge on the questions objected to could have been other than it was. This is a judicial proceeding and the court is restricted in the reception of evidence to only such evidence as meets the requirements of legal proof (*Lee Choy v. U.S.*, 9th Cir., 49 Fed. (2d) 24 at p. 27). In *Fong Lum Kwai v. U.S.*, 9th Cir., 49 Fed. (2d) 19 at p. 23, dealing with a somewhat similar situation (evidence was admitted to show that five Chinese had been admitted on the same death record), this court said:

"* * * evidence of such other decisions by the Board of Special Inquiry admitting other Chinese was objected to as incompetent, *and this objection should have been sustained.*"

This case is parallel in many respects to *Wong Kam Chong v. U.S.*, 111 Fed. (2d) (9th Cir.) 707. Said the court:

"The government offered no direct evidence that appellant was not born in Hawaii. It offered evidence to show that the birth certificate was not a record of appellant's birth, and to show certain discrepancies, none of which affected the testimony of Chung Chong. Could the trial court lawfully disbelieve it? The hearing below was 'judicial'. Ng Fung Ho v. White, 259 U.S. 276, 283, 42 S. Ct. 492, 66 L. Ed. 938 * * * No question as to the credibility of Chong Chung so far as his demeanor and actions in testifying, is present here, because only a written record of his testimony is presented. The evidence was not hearsay. There was no impeachment, or attempt to impeach, and no contrary evidence. The weight of the testimony is not involved, because it is not testimony from which we must infer the ultimate fact, but is evidence of the ultimate fact itself. It is, therefore, either true or false. The presumption is that the witness testified truthfully * * * In short, there is no evidence in the record, or other reason present, which would justify a disbelief of the witness. See 70 D.J. 760 Pr. 916 et seq. The uncontradicted evidence should, therefore, have been accepted. Lau Hu Yuen v. United States, 9th Cir., 85 Fed. (2) 327, 331."

PRIMA FACIE CASE.

The position of counsel has been that the determination of Appellee's citizenship in 1923 by a Board of Special Inquiry and his admission into the United States do not create a prima facie case of citizenship in his favor. We respectfully submit, he is wholly in error in this regard. The case he cites and relies on, *Lum Mon Sing v. United States,* 124 Fed. (2d) 21, is not in point. It deals with the law applicable where a Chinese previously admitted departs from the United States. By departing he impliedly consents to a redetermination of his status when he seeks to re-enter, and the Immigration authorities, in passing on his right to re-enter, are not bound by their prior determination or by the ordinary rules of evidence in gathering facts to support their decision. *But where the citizenship of a Chinese resident here, whose citizenship has been favorably passed upon by a Board of Special Inquiry, is brought in question, it is now settled law that the administrative finding and determination creates in his favor a prima facie case, good against all attacks, until overcome by competent evidence, showing Appellee had gained his admission by fraud or is illegally present in the United States.*

Wong Kam Chong v. U.S., 9th Cir., 111 Fed. (2d) 707;

Choy Yuen Chan v. U.S., 9th Cir., 30 Fed. (2d) 516;

Leong Kwai Yin v. U.S., 9th Cir., 31 Fed. (2d) 738;

Lee Choy v. U.S., 9th Cir., 49 Fed. (2d) 24;

Fong Lum Kwai v. U.S., 9th Cir., 49 Fed. (2d) 19;

Lum Mon Shing v. U.S., 9th Cir., 29 Fed. (2d) 500;

Lau Hu Yuen v. U.S., 9th Cir., 85 Fed. (2d) 327.

OLD DEPARTURE RECORDS.

Counsel has made no point of the fact that the old manifest of the *SS Coptic* ex Honolulu June 3, 1902, does not show the names of Appellee and his mother. The Board which admitted Appellee noted that their names could not be found, but realized these old manifests are worthless as evidence. Names are omitted, some abbreviated, some misspelled; they are inaccurate and incomplete (R. p. 29) and have never been regarded as possessing any importance in determining departures from Honolulu around the turn of the century.

CONCLUSION.

The evidence of Appellee having established prima facie his Hawaiian birth and citizenship, and his evidence being in no wise contradicted or overcome, it is respectfully submitted that the judgment of the District Court should be sustained, and it is so moved.

Dated, Honolulu, Hawaii,
January 12, 1951.

Respectfully submitted,
E. J. Botts,
Attorney for Appellee.